



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. E087 OF 2020

BETWEEN

MURIGI KAMANDE.....PETITIONER

VERSUS

1. NELSON ANDAYI HAVI

2. LAW SOCIETY OF KENYA RESPONDENTS

AND

MERCY KALONDU WAMBUA..... INTERESTED PARTY

RULING

1. There are different Law Firms in this Petition, [and in the related Petition No. E090 of 2020], who claim to have received instructions to act in the Petition, for the Law Society of Kenya [LSK].
2. An Application filed by the Petitioner, dated 26th November 2020, was to be heard on 3rd December 2020.
3. It was brought to the attention of the Court at the hearing that LSK has two Law Firms, representing it in the Petition. It was agreed that the Court should determine who should represent the LSK, before any other Application can be heard.
4. Learned Counsel Mr. Moses Kurgat and Mr. Ochiel holding brief for Mr. Kimani Muhoro, all claiming to have instructions from the LSK, made brief address to the Court, explaining why their respective Law Firms, are the valid Representatives of the LSK in the Petition.
5. Mr. Kurgat told the Court that his Law Firm received instructions to act for the LSK directly from LSK President, Mr. Nelson Havi, who is the 1st Respondent herein. He submits that the President bears authority, and speaks on behalf of the LSK. No one has authority to speak for the LSK, other than the President. The fact that Council Members hold different views from the President, does not take away the authority of the President. He alone, has authority to appoint the Law Firm to represent the LSK in this Petition. Council Members who oppose this, should apply to be added to the proceedings.
6. Mr. Kurgat submits that he was appointed by the LSK President in writing. Council Members, opposed to the President do not constitute the Council. They should have called a meeting of the Council, presided over by the President. The President is in office legitimately. There is no evidence that eight Council Members, have authority to decide who represents the LSK in the Petition. The Head of an Organization, if he is not in some way impaired, should be able to discharge his mandate. Mr. Kurgat urges the Court to strike out the papers filed by Mr. Muhoro, and that the Court endorses his continued representation of the LSK.
7. Mr. Ochiel submits that the LSK Council has 13 Members. The Interested Party is the LSK Secretary. Decisions of the Council are by majority vote. The resolutions of the Council are recorded. The appointment of Mr. Kurgat by the President, is not based on a resolution of the Council.
8. Mr. Ochiel submits that Mr. Muhoro, received a memo from LSK Deputy CEO, Collins Odhiambo, dated 1st December 2020, whereof the Council requested Mr. Muhoro to appear for the LSK. Representation by Mr. Muhoro is on *pro bono* basis. Appointment was by order of the Council. Majority of the Council Members signed the letter. Section 17 of the Law Society of Kenya Act, does not give the President powers outside the Council. Decision of the Council is collective. Mr. Muhoro was appointed through the resolution of the Council.
9. In brief reponse to Mr. Ochiel's submissions, Mr Kurgat submits that by the time the Deputy CEO issued his memo, no Council meeting

had taken place on the subject matter. Mr. Ochiel does not deny that ultimate authority vests with the President. If there was a meeting of the Council, it was an illegal meeting, as it did not involve the President.

The Court Finds: -

10. The dispute regarding who should appear for the LSK, is an offshoot of the main dispute. The main dispute revolves around the LSK President Mr. Nelson Havi, and the LSK CEO Ms. Mercy Wambua. In their respective camps are some Council Members.

11. The President's position is that the CEO is no longer validly in office. The President does not recognize her, and is not ready to work with her. The CEO insists she was absolved by the Council of certain allegations made against her with regard to discharge of her role, and was returned to office through the resolution of the Council. A majority of the Council Members agreed that she resumes office.

12. This internal conflict has affected decision-making in the LSK. The appointment of the Law Firm, or Law Firms to appear for the LSK, in various matters before the Courts, is just one among other decisions, affected by the conflict. For instance, on 9th November 2020, the President wrote to Audit Firm, Parker Randall, calling for forensic audit of the accounts and balance sheet of the LSK, for a specified period. The President directed that the exercise is completed within 30 days of 9th November 2020. The following day, 10th November 2020, the CEO wrote to Parker and Randall, advising that the Council had initiated the process of appointing an Auditor. The Auditor was told to cease the proposed audit, until the process of appointing an Auditor was complete.

13. It is clear therefore, that there is a fundamental conflict within the Council of the LSK. This conflict is not just about the appointment of a Law Firm, or Law Firms, to represent the LSK in this Petition, and related Petitions. It is about the governance of the LSK.

14. The Court will not be assisting the Parties, by endorsing Mr. Kurgat, or Mr. Muhoro, or other Learned Counsel, over the other, in representation of the LSK. By making a ruling for one against the other, the Court will have shown where its mind lies, with regard to the larger dispute. The Court will be fanning the flames engulfing the LSK. It will be prejudicial to the Parties, to say at this stage, that the decision made by the President and his faction in the Council, or that made by the CEO and Council Members in her faction, is the right decision. It should not be the role of the Court to fan the fires of factionalism. The Law Society of Kenya Act, has provisions, which in the view of the Court, empower the President and /or the Council, in appointment of Lawyers, and other professionals, to act for the LSK. Both the President and the Council can appoint a Lawyer to act for the LSK. The law however, presumes that the President and the Council stand on the same platform. Their voice is meant to be a collective voice. Their decisions are meant to be collective. They are all elected by the LSK Members.

15. The most suitable forum to resolve the preliminary and the main issues in dispute, is the General Meeting. Part 3, Section 15, of the LSK Act, deals with effective governance of the LSK. It creates 4 organs of governance: the General Meeting; the Council; the Secretariat; and the Branches. Section 16 of the Act, states that the General Meeting shall be the **supreme authority** of the Society.

16. The LSK Act presupposes that there is a single Council of the LSK. Throughout, the LSK Act refers to 'the Council.' There is one Council. Its decisions are made through majority vote. There is one President, who is a Member of the Council. There is one LSK. Section 3 of the Act establishes one LSK. What the disputants herein are doing, is to pluralize the LSK. The law does not contemplate a situation where the President and the Council act at cross-purposes. As it is, it is not possible to grant orders which can practicably be executed, for or against the LSK. It is not known who the LSK in the dispute is. How will the orders be enforced? One faction could compromise the Petition against the other, risking the resources of the membership at large. The LSK cannot enjoy client-advocate confidentiality with multiple, differently instructed Lawyers. It cannot have control over the litigation. No Court ought to approve this anomaly. The LSK needs to be placed in a position where it has a conventional advocate-client relationship. There is need for some coherence, which the Court is not able to hand to the Parties.

17. Should it happen that the President and the Council are involved in a dead heat, as they seem to be, the Society ought to ask for intervention of the supreme authority of the Society. The President, the Council and the Secretariat are subordinate to the General Meeting. The intervention of the Court as sought, does not result in, or promote, effective governance of the LSK. It would only fan, the fires of factionalism.

IT IS ORDERED: -

- a) The LSK shall present to the Court a resolution of the General Meeting, indicating which Law Firm, Law Firms, or Lawyer shall represent the LSK in Petition No. EO87 of 2020 and Petition EO90 of 2020.***
- b) Pending filing of the resolution of the General Meeting, further proceedings are stayed in both Petitions.***
- c) The LSK President and the Council are in the meantime, encouraged to come together and explore voluntary settlement of the issues that are pulling them apart.***
- d) Parties shall maintain the status quo.***
- e) No order on the costs.***

Dated and delivered at Nairobi this 17th day of December, 2020

James Rika

Judge